Supreme Court, U.S.
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No. 96-248

In The

Supreme Court of the United States

October Term, 1995

MRS. SAMUEL E. ALLGOOD, INDIVIDUALLY AND AS INDEPENDENT EXECUTRIX OF THE ESTATE OF SAMUEL E. ALLGOOD, MARCUS ALLGOOD and MALCOLM ALLGOOD,

Petitioners,

vs.

R.J. REYNOLDS TOBACCO COMPANY, THE AMERICAN TOBACCO COMPANY, THE TOBACCO INSTITUTE, INC. and THE COUNCIL FOR TOBACCO RESEARCH-U.S.A., INC.,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

REPLY BRIEF FOR PETITIONERS

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I. Reply to "Statement of the Case."

Sam Allgood's February 20, 1986 Amoco medical record also states "Chest - no significant abnormality (includes to percussion and auscultation)," so any emphysema was incipient, and the Amoco medical records themselves raise a genuine issue of fact whether Dr. Kenamore ever told Sam Allgood he had emphysema caused by his smoking. Petition for Certiorari, pages 8-9.

II. Reply to "Reasons for Denying the Writ."

The Petition for Certiorari, "Reasons for Granting the Petition," pp. 4-5, summarizes, and the "Argument," pp. 5-30, sets forth, many important federal questions raised by the Fifth Circuit Court of Appeals' Opinion. "Reasons for Granting the Petition" also satisfies the considerations set out in Rules of the Supreme Court 10(a), (c). These questions all arise under F.R.Civ.P. 56, and are all questions of law. Respondents' two cases, *Graver Tank & Mfg. Co.* and *Goodman*, involve proposed review by this Court of fact findings, not conclusions of law, and are inapposite.

III. Reply to "This Case Presents No Serious Preemption Question."

Regarding the second paragraph, the cases cited there, *Cantley*, *Sonnenreich*, and *Griesenbeck*, all involve failure to disclose claims: respectively at the pages cited, "Cantley's fraudulent suppression claim merely alleged generally that the defendants had failed to inform Godfrey of the risks of smoking," "Defendants urge the Court to dismiss those portions of the Complaint alleging that Defendants negligently failed to warn ... ," and "Plaintiff's theory of the case asserts that defendant should have warned her mother somehow... ." Petitioners' fraudulent concealment claim (R. 2054) makes no allegation of failure to disclose or channel for disclosure:

> B. Fraud (Intentional Concealment): while knowing that cigarette smoking was addictive and caused

> disease and death, or at least while knowing that there was credible evidence, as pled in paragraph 5 above, that cigarette smoking was addictive and caused disease and death, and knowing that the public lacked such knowledge and was unable to discover it, concealing such knowledge from the public, including Sam Allgood, including as pled in paragraph 6 above, with the intention of causing them to begin and continue to smoke cigarettes in such ignorance, which Sam Allgood did.

Nor does Texas law on fraudulent concealment require an allegation of failure to disclose or channel for disclosure. *New Process Steel Corp. v. Steel Corp. of Texas*, 703 S.W.2d 209, 214 (Tex. App.--Houston [1st Dist.] 1985, writ ref'd n.r.e.) (approved jury charge). *New Process Steel* is the basis for the State Bar of Texas PJC [Pattern Jury Charge] 105.03:

> Fraud occurs when[:] a. a party conceals *or* fails to disclose a material fact within the knowledge of that party, b. the party knows that the other party is ignorant of the fact and does not have an equal opportunity to discover the truth, c. the party intends to induce the other party to take some action by concealing *or* failing to disclose the fact, and d. the other party suffers injury as a result of acting without knowledge of the undisclosed fact. (emphasis supplied)

Respondents' argument here misses the point entirely.

Regarding the third paragraph, Petitioners had only to show genuine issues of material fact, not "sufficient evidence to support a finding... ."

Respondents' other arguments are adequately addressed in the Petition for Certiorari.

IV. Reply to "II. The Court of Appeals Correctly Ruled That Petitioners' Claims of Strict Liability, Negligence, and Conspiracy Were Time-Barred. A. Dr. Kenamore's Affidavit Was Timely Filed"

Petitioners' counsel received AT's and RJR's reply containing Dr. Kenamore's affidavit, a "50-100 page document ... at 4:50 p.m." on April 11, 1994. (R.5123.) The Docket entry for the April 12, 1994 hearing included this: "4/12/94 ... terminated deadlines, Pltf to file summary not exceed 20 pg's by 4/22/94 at noon ... ." (Dkt. p. 25.) Petitioners were allowed at the April 12, 1994 hearing only to answer Judge Hittner's questions (R. Vol. 24, pp. 4, 23-24, 26, 28, 33-35). Petitioners timely objected to this untimely filing, on the 1st and 14th pages of their timely-filed Summary. (R. 5154, 5139.) The July 28, 1994 hearing before the Magistrate Judge wasn't noticed until July 22, 1994 (not ten days, F.R.Civ.P. 56(c)) (Dkt. p. 25), and the 7/28/94 Minute Entry also stated, "terminated deadlines." (Dkt. p. 27.) Respondents' suggestion that Petitioners might have sought to depose Dr. Kenamore further presumes that Petitioners had any reason to do so when Dr. Kenamore's affidavit was not part of the summary judgment evidence.

Respondents' statement that Petitioners "indicated to Judge Milloy that they were abandoning their objection ..." is wrong. At that hearing Petitioners' counsel had just asserted the untimely filed objection and then said (R. Vol. 25, p. 60):

> Secondly, Your Honor, - - I must say, though, I don't know if that's been cured by we now having had another hearing. I'm not sure of that, so I don't lean on that too strongly. Okay?

Petitioners' counsel did not "abandon" the objection, rather he still relied on it, only "not too strongly." Respondents' statement acknowledges that Petitioners had made the objection, and Petitioners' counsel didn't withdraw their objection made earlier in their Summary. (R. 5154, 5139.)

V. Reply to "II. B. The Court of Appeals Correctly Held That Mere Allegations By Petitioners That Dr. Kenamore May Have Been Mistaken, Without Supporting Evidence, Were Insufficient To Defeat A Motion For Summary Judgment."

Regarding the *Geiserman*, *Duplantis*, and *Roldan Fonseca* cases, these authorities speak of "inadmissible" in terms of violating a substantive evidence rule, such as hearsay or lack of personal knowledge. *Geiserman*, 893 F.2d at 792, states: "First, we uphold the court's exclusion of the affidavit of the proposed expert witness, in order to enforce its discovery order and local rule," and quotes from 10A Wright & Miller, *Federal Practice and Procedure*, §2727, at 156: "Material that is inadmissible ...," which is preceded by:

> Further, Rule 56(e) requires the adversary to set forth facts that would be admissible in evidence at trial.[35]

Footnote 35, after discussing a case rejecting "conclusory statements and statements not made on personal knowledge," points to "the requirement of admissibility set out in §2738," which, at p. 470, states as to summary motion affidavits:

> ... the first question to be addressed is whether the information they contain (as opposed to the affidavits themselves) would be admissible at trial. (n. deleted.)

Duplantis, 948 F.2d at 192, held only that as summary judgment evidence, besides being unsworn, the Robert letter "gives no indication that Robert is qualified to render opinions on such matters." *Roldan Fonseca*, 795 F.2d at 1110, only rejected certain receipt photocopies because they were hearsay, no custodian statement was offered, and there was no statement on personal knowledge that they evidenced payment on the note.

Regarding the third paragraph, Respondents did not dispute the Petition for Certiorari, at pp. 6-7, showing that in this Court's decision in *Celotex*, the non-movant's decedent's

ex parte deposition was accepted as summary judgment evidence, even though the decedent could not appear at trial. All of Respondents cases on this point are pre-*Celotex*, except *Peoples Mortgage*, which did not involve any opposing deposition. Also, in the *Peoples Mortgage*, *Modern Home Institute*, and *Prusinki* cases, the party attempting to raise a genuine issue with an opposing affidavit or other summary judgment evidence, had no summary judgment evidence whatsoever to counter with, and only argued speculatively as to what they could do on cross at trial. Allgood's deposition isn't offered in a vacuum, since the Petition for Certiorari, at pages 8-9, shows that Dr. Kenamore's affidavit testimony, should he appear at trial and repeat it, will be effectively contradicted by his own records. *Hoover* and *Tormo* so stated only to distinguish *Taylor*, which was unnecessary since in *Taylor* the court had barred the ex parte deposition under the predecessor to F.R.Civ.P. 32(a), and *Hoover* and *Tormo* had already rejected the Rule 32(a) argument and accepted the ex parte depositions as affidavits.

Respondents' other arguments are adequately addressed in the Petition for Certiorari.

VI. Reply to Respondents' Sections III, IV and V.

At Brief in Opposition, p. 8, *Dallas Power and Light* and *American Alloy Steel* are commercial cases. At page 9, top paragraph, Respondents ignore the summary judgment evidence of reliance, once access is shown, at Petition for Certiorari, pp. 21-25 (Knox, Brumfield, Grabowski, Crainer, *Vasquez* progeny, *Beck*).

Respondents' other arguments in these Sections are adequately addressed in the Petition for Certiorari.

Respectfully submitted,

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